Written by **Jack Kenny** on June 25, 2013

Justice Thomas Likens Affirmative Action to Segregation Laws

The rationale of the University of Texas for using race as a factor in determining who will be admitted to the school "echoes" legal arguments made by segregationists in previous decades, wrote Justice Clarence Thomas in his opinion in the U.S Supreme Court decision issued Monday on a constitutional challenge to the university's affirmative action program.

In a 7-1 decision, the court reaffirmed its holding in an affirmative action case of a decade ago, ruling that race may be considered among other factors in an admissions policy to meet a "compelling state interest" in achieving a diverse student population. But it remanded to the Fifth Circuit Court of Appeals in New Orleans the suit brought by Texas resident Abigail Fisher (shown), a white student who was denied admission to the University of Texas. Fisher claims her right to the constitutionally guaranteed "equal protection of the laws" was violated by the Austin university's race-based consideration. Fisher's suit was denied in both the federal district court and appeals court level, but the Supreme Court Monday instructed the appeals court to reexamine the case, exercising the standard of "strict scrutiny" to determine if the racial consideration is necessary to achieve the goal of educational diversity. Thomas was one of the seven justices agreeing on the remand, but his concurring opinion indicated he would rather send the court's affirmative action rulings to the dustbin of overturned precedents. Thomas wrote:

> Unfortunately for the University, the educational benefits flowing from student body diversity — assuming they exist — hardly qualify as a compelling state interest. Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's, but emphatically rejected by this Court. And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then … the alleged educational benefits

of diversity cannot justify racial discrimination today.

The admissions program at issue was begun by the University of Texas in the 1990s. It grants automatic admission to any applicant whose academic ranking in secondary school places the student in the top 10 percent of his or her graduating class. That accounts for 90 percent of the new enrollees. Admission to the remaining 10 percent of the available slots takes into consideration academic achievement, as well as a number of other factors, including racial and ethnic diversity. Fisher says she was rejected in favor of less qualified minority students because she is white. The legal challenge claims a violation of her civil rights under the 14th Amendment guarantee that no state may "deny to any person within its jurisdiction the equal protection of the laws." Race-based discrimination was also outlawed by the 1964 Civil Rights Act.

In writing the opinion of the court, Justice Anthony Kennedy affirmed the court's 2003 ruling in *Grutter v. Bollinger*, finding the race-based factor in the admissions policy at the University of Michigan Law School was acceptable in advancing a "compelling state interest" in promoting a diverse educational experience. That, he said, remains a "given." What is new is the strict scrutiny requirement that places the burden on the university to demonstrate that it is not possible to achieve that diversity without factoring in the racial component.

"The reviewing court must ultimately be satisfied that no workable race-neutral alternative would produce the educational benefits of diversity," Kennedy wrote. Justice Ruth Bader Ginsburg, arguing against the remand, cast the lone dissenting vote. Justice Elena Kagan, who worked on the Department of Justice defense of the university's position while serving as solicitor general, recused herself from the case.

"As the thorough opinions below show, the University's admissions policy flexibly considers race only as 'a 'factor of a factor of a factor of a factor' in the calculus" used in determining admissions, Ginsburg wrote, disputing the need for the "strict scrutiny" requirement.

At the heart of the Equal Protection Clause is "the principle that the government must treat citizens as individuals and not as members of racial, ethnic, or religious groups," wrote Thomas. "It is for this reason that we must subject all racial classifications to the strictest of scrutiny."

In his autobiography, Thomas acknowledged that his own admission to Yale Law School was based in part on the school's affirmative action program, a point not lost on supporters of the policy.

"I don't expect Clarence Thomas to ever support affirmative action even though he was the beneficiary of affirmative action," Marc Morial, president and CEO of the National Urban League told *U.S. News & World Report*. "But this case is not over. The good news is that the case did not overrule the compelling necessity of diversity in college admissions. And so I hope we're going to see this case again in the Supreme Court in two or three years."

Some supporters of affirmative action seemed relieved that the court did not overthrow the policy by ruling it unconstitutional. "Today's decision is an important victory for our nation's ongoing work to build a more inclusive, diverse America," said Wade Henderson, president of the Leadership Conference on Civil and Human Rights. "We believe that the University of Texas's admissions policy is a carefully crafted one that will ultimately be upheld by the Court of Appeals."

David Gans of the Constitutional Accountability Center commented that most court watchers were surprised by the narrowness of the decision. "The court backed away from the edge of the cliff today," he told the *Christian Science Monitor*. The plaintiff, meanwhile, issued a statement thanking the court

for moving a step closer to that precipice. Fisher said she was "grateful to the justices for moving the nation closer to the day when a student's race isn't used at all in college admissions."

Carrie Severino, chief counsel for the Judicial Crisis Network, said the decision moves the court "one step closer to agreeing with the countless parents who simply want their children to be evaluated on the basis of their character and hard work."

Photo of Abigail Fisher: AP Images